Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1325 (2)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK V. PONTERIO,

Petitioner,

v.

EDWARD I. KOCH, both individually and as Mayor of the City of New York, THE CITY OF NEW YORK, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, THE COUNCIL OF THE CITY OF NEW YORK, MELVIN MARKUS, both individually and as Chairman of the Council Redistricting Commission, and THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IN OPPOSITION

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-6040 or 3323

LEONARD KOERNER,
LARRY A. SONNENSHEIN,
DANA ROBBINS,
of Counsel.

BEST AVAILABLE COPY

16pp

QUESTION PRESENTED

Did the postponement of the scheduled primary election, pursuant to Court order, Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y., E.D.N.Y., 1981), application for stay denied, 453 U.S. 946 (1981), enjoining the election based on the Attorney General's failure to issue preclearance for the City's redistricting plan, required by the Voting Rights Act, deprive plaintiff, a candidate, of due process of law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
FACT STATEMENT.....	2
ARGUMENT	
FURTHER REVIEW IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CORRECT. THERE IS NO CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR ANY OTHER COURT.....	7
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
Cases:	
American Party of Texas v. White, 415 U.S. 767 (1974)	8
Briscoe v. Kusper, 435 F2d 1046 (7th Cir., 1970)	7
Duncan v. Poythress, 657 F2d 691 (5th Cir., 1981)	7
Griffin v. Burns, 570 F2d 1065 (1st Cir., 1978)	7
Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y., 1981) application for stay den'd 453 U.S. 946 (1981)	(i), 4 8
Perkins v. Matthews, 400 U.S. 379 (1971)	9
Rodriquez v. Popular Democratic Party 457 U.S. 1 (1982)	7
Snowden v. Hughes, 321 U.S. 1 (1944)	x
Statutes:	
28 U.S.C. 1254(1)	2
28 U.S.C. 2284	4
42 U.S.C. §1973	2, 3

42 U.S.C. §1983..... 5

New York City Local Law 22..... 5

New York City Local Law 47..... 3

28 C.F.R. §51.32, 51.35..... 3

No. 84-1325

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

FRANK V. PONTERIO,

Petitioner,

v.

EDWARD I. KOCH, both individually and as Mayor of the City of New York, THE CITY OF NEW YORK, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, THE COUNCIL OF THE CITY OF NEW YORK, MELVIN MARKUS, both individually and as Chairman of the Council Redistricting Commission, and THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is unreported. The opinion of the District

Court (Pet. App. 5a-19a) is reported at 586 F. Supp. 77.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1984. The petition for a writ of certiorari was filed on February 16, 1985. The jurisdiction of this Court is invoked under 28 US.C. 1254(1).

FACT STATEMENT

Background of Postponement of the Election

Three counties in the City of New York - Kings, New York, and Bronx - are subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c) (A25).* These counties are thus required to obtain federal approval before implementing "any voting qualification or prerequisite to voting, or standard practice or

*Numbers in parentheses refer to pages of the Appendix before the Court of Appeals.

procedure" different from that in effect on the date coverage was determined. 42 U.S.C. §1973(c). A covered jurisdiction may satisfy this requirement by obtaining approval either from the United States District Court for the District of Columbia or from the Attorney General of the United States. Once a proposed plan is submitted to the Attorney General, he has sixty days to approve the plan or interpose an objection. 42 U.S.C. §1973(c). The sixty day period may be shortened if the jurisdiction requests expedited review. 42 U.S.C. §1973(c), see also, 28 C.F.R. §51.32. If, however, the Attorney General requests additional information, the sixty day period begins to run anew. 28 C.F.R. §51.35 (1982).

On May 29, 1981 the New York City Council adopted a redistricting plan which divided the City into 35 councilmanic districts. On June 6, 1981, Mayor Koch signed this plan into law as Local Law 47 (A9).

Less than one week after the redistricting plan became law, on June 12, 1981, the City submitted the plan to the Attorney General, requesting

expedited review. Shortly before the sixty day review period would have expired, the Attorney General requested additional information and the review period was extended. Thereafter, several citizens brought actions seeking an injunction against any election, on the ground that the redistricting plan violated the Voting Rights Act. The City opposed the injunction based on the proximity of the election and the fact that the City and the candidates had expended irrecoverable time and money. Nonetheless, on September 8, 1981, a three judge court, convened pursuant to 28 U.S.C. §2284, granted the injunction. The City's urgent efforts to stay application of this order were unsuccessful when the United States Supreme Court denied the City's application one day before the scheduled primary election. Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y., E.D.N.Y., 1981), application for stay denied, 453 U.S. 946 (1981).

Although the injunction only applied to the three covered counties, including District 35, where

plaintiff was a candidate,* to avoid confusion, the City postponed the primary election scheduled for September 10, 1981, and the November 3, 1981 councilmanic election, in all five counties. On October 27, 1981, the Justice Department informed the City that it had failed to establish that the redistricting plan was drawn without a racially discriminatory purpose and denied preclearance. A new redistricting plan, Local Law 22 of 1982, signed into law on May 2, 1982, was approved by the Justice Department on June 9, 1982. Councilmanic primary elections were held on September 23, 1982, the date established by the State Legislature.**

Plaintiff's 42 U.S.C. §1983 Action

On January 17, 1983, plaintiff commenced an action pursuant to 42 U.S.C. §1983. Plaintiff, who

*District 35 is located partially in Kings County and partially in Richmond County. Local Law 47.

**Plaintiff ran in this election, seeking the Democratic nomination for the 35th councilmanic district. He was defeated (A26).

qualified for the ballot in the councilmanic primary election originally scheduled for September 10, 1981 (A8), claimed that he had expended considerable time and money in reliance on the election schedule published by the New York City Board of Elections and claimed that defendants had negligently failed to obtain preclearance before September 10, 1981 (A10). Plaintiff claimed that, as a result of defendants' negligence, he was deprived of his constitutional right to run for the public office of council member in the 1981 primary election. Plaintiff sought damages of $400,000. Defendants demanded judgment dismissing the complaint on the ground that the Court lacked subject matter jurisdiction and that defendants did not violate any rights guaranteed the plaintiff.

ARGUMENT

FURTHER REVIEW IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE COURT OF APPEALS THAT THE POSTPONEMENT OF THE ELECTION DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

This Court has held that the right to vote or run for public office is not "per se" guaranteed by the federal constitution. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982). See also, Snowden v. Hughes, 321 U.S. 1 (1944). Thus, a violation of due process may be found in a state election only "if the election process itself reaches the point of patent and fundamental unfairness" Griffin v. Burns, 570 F2d 1065, 1078 (1st Cir., 1978). See also Duncan v. Poythress, 657 F2d 691 (5th Cir., 1981); Briscoe v. Kusper, 435 F2d 1046 (7th Cir., 1972). Petitioner cannot argue that the City's postponement of the primary election, pursuant to a Court order finding possible noncompliance with the Voting Rights Act, was fundamentally unfair. Significantly, the primary election, in which

petitioner ran and was defeated, was held a year later, and thus petitioner's opportunity to run for office was not abrogated but merely delayed. Moreover, there is no allegation that the postponement of the election invidiously disadvantaged petitioner vis a vis the other candidates.

The Court of Appeals properly relied on American Party of Texas v. White, 415 U.S. 767, 781 (1974) which established that the right to appear on the ballot as a candidate for public office is subject to reasonable conditions and qualifications (Pet. App., p. 3A). While accepting this principle, petitioner now argues that the Court of Appeals decision is wrong because the measures taken by the City were not reasonable (Pet. Br., p. 9-10). In support of this argument, petitioner relies on the finding of the three judge district court in Herron v. Koch, 523 F. Supp. 167, 174 (S.D.N.Y., E.D.N.Y., 1981) application for stay den'd 453 U.S. 946 (1981), that while the City did not act in bad faith it "consciously chose a course of action that was not

designed to facilitate a swift and complete review by the Attorney General." This finding was based on the fact that the City did not supply the Attorney General with certain optional information. However, respondents stress that the City complied fully with all statutory requirements. Moreover, the City completed its initial submission well in advance of the scheduled primary election, and requested expedited review. Even assuming, arguendo, that the City's failure to supply the optional information was negligent, this does not establish that the postponement of the primary election in order to comply with federal law was an unreasonable restriction upon petitioner's right to run for public office.

There is no conflict between the decision of the Court of Appeals herein and Perkins v. Matthews, 400 U.S. 379 (1971) as petitioner asserts (Pet. br., p. 8). In Perkins, the plaintiffs sought to enjoin an election based on the failure of Canton, Mississippi to obtain preclearance for certain changes. The municipality opposed this relief, and

this Court, while remanding to the District Court for a determination of the proper remedy, stated inter alia, 400 U.S. at 396:

> Moreover, based upon ample proof of repeated evasion of court decrees and of extended litigation designed to delay the implementation of federal constitutional rights, Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation.

It is obvious that this language has no bearing on the situation herein, where the municipality postponed the election in order to comply with federal law. Thus, this issue does not require resolution by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

March 15, 1985

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

LEONARD KOERNER,
LARRY A. SONNENSHEIN,
DANA ROBBINS,
of Counsel.